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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-311

GENERAL ADJUSTMENT BUREAU, INC. and
PROPERTY LOSS RESEARCH BUREAU,
Petitioners,

VERSUS

MAC ADJUSTMENT, INC., and B. J. GOSTING,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1979

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The Respondents, Mac Adjustment, Inc., and B. J. Gosting, respectfully pray that this Court deny the writ of certiorari requested herein by Petitioners to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 30, 1979.

OPINION BELOW

The opinion of the Court of Appeals is reported at 597 F.2d 1318 (10th Cir. 1979) and appears in the Appendix of Petitioners' brief. The opinion and order of the United States District Court for the Western District of Oklahoma were not published, but also appear in the Appendix to Petitioners' brief.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered April 30, 1979. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on May 30, 1979, and the Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the District Court was invoked under Section 1 of the Sherman Act, 15 U.S.C. § 1, and under 28 U.S.C. § 1337.

QUESTIONS PRESENTED

1. Whether summary judgment is appropriate if there is a genuine issue as to any material fact.

2. Whether the plaintiff in a Sherman antitrust case must show, in a response to a motion for summary judgment which challenges only the jurisdictional predicate of plaintiff's action, the existence of a sufficient nexus with interstate commerce to warrant the exercise of federal jurisdiction. (Question presented in Petitioner's brief.)

3. Whether a Federal District Court may conduct an evidentiary hearing in considering a motion for jummary judgment which challenges only the jurisdictional predicate of plaintiff's action. (Question presented in Petitioner's brief.)

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15:

"§ 1. Trusts in Restraint of Trade Illegal:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ."

Federal Rules of Civil Procedure:

"Rule 43(e): Evidence on Motions.

"When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition."

"Rule 56(c): Summary Judgment

". . . the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ."

STATEMENT OF THE CASE

Respondents, Mac Adjustment, Inc., and its president and sole owner, B. J. Gosting, do not take issue with the statement of the case as set forth in Petitioners' brief with the following additional statements:

The evidence which was in the case at the time of considering the motion for summary judgment included evidence that Respondents represented insurance companies

within and without the State of Oklahoma and that at the time of the alleged act of Petitioners that Respondent was representing one hundred eighty insurance companies, only one of which was domiciled in Oklahoma. The evidence further disclosed that Respondents were actively engaged in business both inside and outside the State of Oklahoma and had conducted the adjusting business in the states of Kansas, Oklahoma, Texas, North Dakota and Missouri. The evidence further revealed that Respondents were actively engaged in the adjustment of losses on insurance policies and claims which transcended state lines and that the adjustment of said losses were a necessary and vital function of the insurance business and the companies which Respondent represented. The evidence also showed that Respondents did adjusting work concerning interstate shipments involving cattle and other freight traveling through Oklahoma from other states. Respondents' representation of the 180 insurance companies in 1973 at the time of the alleged acts of Petitioners, dropped to a representation of only one company in 1976. With Respondents essentially out of business, these 179 insurance companies had to find other adjustment companies to have the necessary function of adjusting work done for this interstate insurance business, resulting in a lessening of competition and its associated cost adjustments.

REASONS FOR DENYING THE WRIT

1.

SUMMARY JUDGMENT SHOULD ONLY BE GRANTED WHERE THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THE MOVING PARTY IS ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

The summary judgment procedure authorized by Rule 56 is a method for promptly disposing of actions in which there is no genuine issue as to any material fact or in which only a question of law is involved.

A motion for summary judgment lies only where there is no genuine issue of material facts; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the Court cannot try issues of fact on a Rule 56 motion but only is empowered to determine whether there are issues to be tried. WRIGHT AND MILLER, Federal Practice and Procedure, Civil Section 2712.

The Supreme Court has used the following language to emphasize the way in which the reviewing Court should evaluate the record on appeal from a summary judgment:

> "On summary judgment the inferences to be drawn from the underlying facts contained in the affidavits, depositions and exhibits must be viewed in the light most favorable to the party opposing the motion." *U.S.* v. *Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176.

and

> "We look at the record on summary judgment in the light most favorable to the party opposing the motion." *Poller* v. *Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458.

The reviewing Court cannot decide disputed issues of material fact; it only may determine whether a genuine issue exists and whether the law was applied correctly. Accordingly, it must reverse the grant of a summary judgment motion if it appears from the record that there is an unresolved issue of material fact. *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347.

The Tenth Circuit correctly applied the law and the facts in reversing the judgment of the District Court. In doing so the court stated "it is fundamental that summary judgment is appropriate if and only if there is no genuine issue as to any material fact. Only then is the moving party entitled to a judgment as a matter of law. What we are saying above is that the record does not demonstrate that there exists no genuine issue as to any material fact whereby the movants would be entitled to judgment as a matter of law. When such an issue is present, summary judgment is not appropriate."

Also the Court correctly stated that in *Goldfarb* v. *Virgina State Bar*, 421 U.S. 773 (1975), the Supreme Court considered the interstate commerce requirement where the activity restrained (title examination) was an integral part of the transaction (financing home purchases). In that case significant amounts of the loan money came from outside the state, and the lenders required a title examination before loans could be granted. It is submitted that the case at bar is parallel to the *Goldfarb* case in that the activity restrained (insurance adjusting) was an integral part of the transaction (insurance business).

The *Goldfarb* case is also significant in that it states that "for purposes of the antitrust proscriptions of Section 1 of the Sherman Act, where even though the services were performed wholly intrastate, (1) a significant portion of funds frunished for purchasing homes in the county came from outside the state, and (2) significant amounts of loans were guaranteed by federal agencies headquartered in the District of Columbia; the necessary connection between the interstate transactions and the restraint of trade provided by the minimum fee schedule was present because, in a practical sense, title examination, required by lenders, were necessary in real estate transactions to assure a lien on a valid title of the borrower, title examination thus being an integral part of an interstate transaction; the absence of a showing that home buyers were discouraged by the challenged activity does not mean that interstate commerce was not affected, nor is it necessary to show that the fee schedule raised prices, where it was established that the schedule fixed fees and thus deprived consumers of advantages derived from free competition." It is submitted that the Tenth Circuit correctly found similar facts supporting the jurisdictional requirements relating to the Sherman Act in the instant case.

Proposition 1 set out in Petitioners' brief misstates the finding of the Tenth Circuit and the reasons for said finding. It is submitted that the Tenth Circuit correctly made the determination under the Rule 56 requirements for summary judgment and applied the proper legal test relating to the factual issues of jurisdiction when the court found that a factual issue was present relating to the material facts required and that summary judgment would not be appropriate in such case.

Proposition 2 set out in Petitioners' brief which states that the Tenth Circuit condemns the use of an evidentiary hearing by the District Court in its consideration of a motion for summary judgment challenging the jurisdictional predicate of the action is of no significance in the present case. The Tenth Circuit did not base any ruling upon the fact that an evidentiary hearing was conducted. Any discussion relating to the propriety of an evidentiary hearing did not enter into the decision that summary judgment was improper in the instant case. The record does not demonstrate that there exists no genuine issue as to any material fact whereby the movants would be entitled to judgment as a matter of law. When such an issue of fact is present, summary judgment is not appropriate.

2.

A REVIEW ON WRIT OF CERTIORARI IS NOT A MATTER OF RIGHT, BUT OF SOUND JUDICIAL DISCRETION, AND WILL BE GRANTED ONLY WHERE THERE ARE SPECIAL AND IMPORTANT REASONS THEREFOR.

Petitioners in their brief attempt to invoke jurisdiction of the Supreme Court for the writ of certiorari on the basis that the Court of Appeals for the Tenth Circuit has wrongfully condemned the use of evidentiary hearing in passing on a motion for summary judgment. What Petitioners have failed to consider in the Opinion of the Tenth Circuit is that even though the use of an evidentiary hearing was discussed by the Tenth Circuit Court, it did not base its decision on said matters, but instead based its decision, and properly so, upon the question of whether or not summary judgment was proper where there was genuine issue of material facts present.

It is also submitted that the law applied by the Tenth Circuit in ruling on the motion for summary judgment was that approved by this Court in all prior determinations relating to Rule 56 motions. The Tenth Circuit Court of Appeals decision is not in conflict with the decision of any other Court of Appeals on the same matter nor has it decided an important question of federal law which has not been previously settled by this Court, nor is the decided federal question in conflict with the applicable decisions of this Court.

CONCLUSION

For these reasons, a writ of certiorari should not issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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